

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No.: EB-06-TC-421
)	
Response Card Marketing, Inc.)	NAL/Acct. No.: 200832170045
)	
Apparent Liability for Forfeiture)	FRN: 0017629833
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FORFEITURE ORDER

Adopted: April 10, 2012

Released: April 10, 2012

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we issue a monetary forfeiture¹ in the amount of \$9,000 against Response Card Marketing, Inc. (“Response Card Marketing”) for willful and repeated violations of section 227 of the Communications Act of 1934, as amended (“Act”),² and the Commission’s related rules and orders, by delivering two unsolicited advertisements to the telephone facsimile machine of one consumer.

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the Commission’s *Notice of Apparent Liability for Forfeiture* (“NAL”),³ and need not be reiterated at length.

¹ See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has “willfully or repeatedly failed to comply with any of the provisions of this [Act] or of any rule, regulation, or order issued by the Commission under this [Act]”; see also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who does not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person’s place of residence; and (C) subsequently engages in conduct of the type described in the citation).

² 47 U.S.C. § 227.

³ *Response Card Marketing, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd. 5693 (Enf. Bur. 2008). According to Response Card Marketing’s May 2, 2008 letter, the company had discontinued all operations as of the date of its response. Letter from Dennis Gordon, Response Card Marketing, Inc., to Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-421, at 2, dated May 2, 2008 (“*Response Card Marketing’s May 2, 2008 NAL Response*”).

3. The Telephone Consumer Protection Act of 1991 (“TCPA”) was enacted by Congress to address problems of abusive telemarketing, in particular junk faxes.⁴ Unsolicited faxes often impose unwanted burdens on the called party, including costs of paper and ink, and making fax machines unavailable for legitimate business messages. Section 227(b)(1)(C) of the Act generally makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement” unless the sender has an established business relationship with the recipient.⁵

4. On September 12, 2006, in response to a consumer complaint alleging that Response Card Marketing had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁶ to Response Card Marketing, pursuant to section 503(b)(5) of the Act,⁷ for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for insurance products to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation informed Response Card Marketing that within 30 days of the date of the citation, it could either request an interview with Commission staff, or provide a written statement responding to the citation. The Bureau did not receive a response to the citation.⁸

5. Following the issuance of the citation, the Commission received additional complaints from an individual, C. Stinnett, on the behalf of her employer, Seminole County Farm Bureau, alleging receipt of unsolicited facsimile advertisements from Response Card Marketing. These apparent violations, which occurred after the Bureau’s citation, resulted in the issuance of the *NAL* against Response Card Marketing in the amount of \$9,000.⁹ The *NAL* ordered Response Card Marketing either to pay the proposed forfeiture amount within thirty (30) days or submit evidence or arguments in response to the *NAL* to show that no forfeiture should be imposed or that some lesser amount should be assessed. On May 2 and October 24, 2008, Response Card Marketing responded to the *NAL*.¹⁰ In *Response Card Marketing’s May 2, 2008 NAL Response*, it asserts that it only faxes information to individuals and businesses with whom it has an established business relationship.¹¹ In support of its established business relationship, *Response Card Marketing’s October 24, 2008 Supplemental NAL Response* included billing information, showing an order for a mailing list placed by J. Semtner, an agent at Seminole County Farm Bureau, the same organization at which complainant C. Stinnett worked.¹²

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, *codified at* 47 U.S.C. § 227. *See also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁵ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

⁶ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-07-TC-421, issued to Response Card Marketing on September 12, 2006. Due to an administrative error, this citation was mailed out referring to File No. EB-07-TC-421. The correct file number is EB-06-TC-421.

⁷ *See* 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission’s rules and orders).

⁸ Response Card Marketing refers to a citation response dated September 29, 2006 in its May 2, 2008 *NAL Response*. However, the Bureau does not have any record of this response.

⁹ *See supra* note 3; *see also* 47 U.S.C. § 503(b)(1).

¹⁰ *See Response Card Marketing’s May 2, 2008 NAL Response, supra* note 3; Letter from Dennis Gordon, Response Card Marketing, Inc., to Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-421, dated October 24, 2008 (“*Response Card Marketing’s October 24, 2008 Supplemental NAL Response*”).

¹¹ *Response Card Marketing’s May 2, 2008 NAL Response* at 1.

¹² *Response Card Marketing’s October 24, 2008 Supplemental NAL Response*, Exhibit A.

III. DISCUSSION

6. Under the Commission's rules, the "established business relationship" exception permits a party to deliver a message to a consumer if: (1) the sender has an established business relationship¹³ with the recipient; (2) the sender obtained the number of the facsimile machine through the voluntary communication by the recipient, directly to the sender, within the context of the established business relationship, *or* through a directory, advertisement, or a site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution; and (3) the advertisement contains a notice about how to "opt-out" of receiving future unsolicited advertisements from that company and does so in conformity with specific requirements set forth in the Commission's rules.¹⁴ Upon review of the record, we conclude that Response Card Marketing has demonstrated that it had an established business relationship with Seminole County Farm Bureau, and that it received that bureau's fax number through a voluntary communication in the context of that established business relationship, as evidenced by the order for a mailing list placed by J. Semtner, an agent at Seminole County Farm Bureau.¹⁵ However, the opt-out notice that Response Card Marketing provided in connection with the faxes in question does not satisfy all of the statutory and regulatory requirements.¹⁶

7. Section 64.1200(a)(3)(iii)(A)-(D) of the Commission's rules set forth the specific requirements that an opt-out must contain.¹⁷ Section 64.1200(a)(3)(iii)(A)¹⁸ first requires that the opt-out language not only be clear and conspicuous, but also be located on the first page of the advertisement. Here, the notice that Response Card Marketing provided was on the second page of the advertisement

¹³ An "established business relationship" is defined as a prior or existing relationship formed by a voluntary two-way communication "with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(5).

¹⁴ See 47 U.S.C. § 227(b)(1)(C); *see also* 47 C.F.R. § 64.1200(a)(3)(i), (ii), (iii). Section § 64.1200(a)(3)(iii) reads as follows:

The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if -- (A) The notice is clear and conspicuous and on the first page of the advertisement; (B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful; (C) The notice sets forth the requirements for an opt-out request under paragraph (a)(3)(v) of this section; (D) The notice includes -- (1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and (2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and (E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

¹⁵ See n.12 *supra*.

¹⁶ See n.13 *supra*.

¹⁷ 47 C.F.R. § 64.1200(a)(3)(iii)(A)-(D).

¹⁸ 47 C.F.R. § 64.1200(a)(3)(iii)(A).

rather than the first page.¹⁹ The importance of the requirement that the notice appear on the first page and not elsewhere is underscored by the fact that Congress specifically legislated that the Commission's implementing rules include this requirement.²⁰

8. Section 64.1200(a)(3)(iii)(B) next requires the notice to state that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting specified requirements is unlawful. Rather than including such information for the fax recipient, the actual opt-out notice in the fax at issue here states, "Fax removals are easy! 24 hour automated service, call 1-888-662-2677 and enter your reference ID ... and you will be removed immediately."²¹ Thus, the opt-out notice simply states that a recipient call a toll-free number to be removed from the company's fax list, but does not specify that failure to comply within 30 days is unlawful, as is required by the Commission's rules.²² Again, the importance of the timing requirement in the Commission's rules is evidenced by the fact that Congress legislated that the rules include such a requirement.²³

9. Section 64.1200(a)(3)(iii)(C) requires that the notice include requirements, set out in subsection (a)(3)(v), for the recipient to follow in making an opt-out request. These requirements include that the request identify the particular telephone number of the facsimile machine to which the request relates; that the request is made to the telephone number, facsimile machine, website, or email address identified in the sender's fax; and that the recipient has not, subsequent to his or her request, authorized the sender to send a fax to him or her at the number indicated in the request.²⁴ As indicated above, the notice in question here simply instructs the recipient to call a certain number and enter a "reference ID," which clearly does not satisfy the Commission's regulatory requirements. Again, these requirements were legislated by Congress.²⁵

¹⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-338, *Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3801, para. 26 (2006) ("2006 TCPA Report and Order and Third Order on Reconsideration") ("Consistent with the definition in our truth-in-billing rules, 'clear and conspicuous' for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer. We also conclude that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. Many facsimile advertisements today contain text covering the entire sheet of paper, making it difficult to see an opt-out notice that is placed amongst the advertising material. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. We clarify that, in accordance with the Junk Fax Prevention Act, if there are several pages to the fax, the first page of the advertisement must contain the opt-out notice.") See also *Truth-in-billing requirements at 47 C.F.R. § 64.2401(e)*.

²⁰ 47 U.S.C. § 227(b)(2)(D)(i).

²¹ See Complaint dated August 21, 2007, from C. Stinnett.

²² See also *2006 TCPA Report and Order and Third Order on Reconsideration* at 21 FCC Rcd 3787, 3803-4, paras. 30-31 ("The Junk Fax Prevention Act requires that the opt-out notice on the facsimile advertisement states that 'failure to comply, within the shortest reasonable time, as determined by the Commission, with such a[n] opt out] request ... is unlawful.' ...") In accordance with the Junk Fax Prevention Act, we conclude that senders must comply with an opt-out request within the shortest reasonable time of such request. Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, we conclude that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made.")

²³ 47 U.S.C. § 227(b)(2)(D)(ii).

²⁴ 47 C.F.R. § 64.1200(a)(3)(iii)(C); 47 C.F.R. § 64.1200(a)(3)(v).

²⁵ 47 U.S.C. §§ 227(b)(2)(D)(iii), 227(b)(2)(E).

10. Finally, section 64.1200(a)(3)(iii)(D) of the rules requires that the opt-out notice include a domestic contact telephone number, facsimile machine number, and cost-free mechanism for opt-out requests,²⁶ as required by Congress.²⁷ While Response Card Marketing did provide a domestic contact telephone number as part of its opt-out notice, it did not provide the facsimile machine number for the recipient to transmit such a request to the sender.

11. Accordingly, Response Card Marketing did not meet all of the other requirements of the opt-out notice provision under the established business relationship exception.²⁸ Because essential opt-out information was not provided, Response Card Marketing cannot take advantage of the established business relationship exception.²⁹

12. Response Card Marketing failed to identify facts or circumstances to persuade us that there is a basis for canceling the proposed forfeiture. We are therefore not aware of any mitigating circumstances to warrant a cancellation or reduction of the forfeiture penalty. While Response Card Marketing submitted billing information, showing an order for a mailing list placed by J. Semtner, an agent at Seminole County Farm Bureau, in support of its established business relationship with the insurance company and that it obtained the recipient's fax number as required by Commission's rules, it failed to meet the opt-out notice requirement of the established business relationship exception. Based on the information before us, we hereby impose a total forfeiture of \$9,000 for Response Card Marketing's willful or repeated violation of section 227 of the Act and the Commission's related rules and orders, for the reasons set forth in the NAL.

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), and under authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Response Card Marketing, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** to the United States Government in the sum of \$9,000 for willfully or repeatedly violating section 227(b)(1)(c) of the Communications Act, 47 U.S.C. § 227(b)(1)(c), section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders as described in the paragraphs above.

14. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act, 47 U.S.C. § 504(a). Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-

²⁶ 47 C.F.R. § 64.1200(a)(3)(iii)(D).

²⁷ 47 U.S.C. § 227(b)(2)(D)(iv).

²⁸ See note 13, *supra*.

²⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-338, *Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3808, para. 40 (2006) (“Based on our enforcement experience, and the fact that highly involved fax broadcasters will have firsthand knowledge of the inclusion of the opt-out notice, we determine that a fax broadcaster must, at a minimum, ensure that faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt out of a particular sender's faxes in the future. Otherwise, the consumer may have no means of stopping unwanted faxes transmitted by the fax broadcaster on behalf of various advertisers.”)

C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Response Card Marketing, Inc. will also send electronic notification on the date said payment is made to Johnny.Drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

15. **IT IS FURTHER ORDERED** that a copy of the Forfeiture Order shall be sent by First Class mail and certified mail return receipt requested to Response Card Marketing, Inc., 16 Pierson Drive, Andover, NJ 07821, Attention: Dennis Gordon.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau